Marquette Law Review

Volume 52
Issue 3 *Fall 1969*

Article 3

Liability of Excess and Primary Automobile Insurance Companies for Defense Costs

Arnold P. Anderson

COMMENTS

LIABILITY OF EXCESS AND PRIMARY AUTOMOBILE INSURANCE COMPANIES FOR DEFENSE COSTS

INTRODUCTION

The supplementary payments provision of the Standard Family Automobile Policy covers "all expenses incurred by the company" and "all costs taxed against the *insured* in any suit."[1] Insofar as there is any conflict between insured and insurer as to who should pay defense costs, the policy language seems quite clear:

> The words "all costs" mean just that. They do not admit of the interpretation urged by the appellant. If appellant had wished to contract to pay only a proportionate share of costs based on the applicable limits of liability in the policy, it could easily have used appropriate language to achieve that result.[2]

If there is other insurance covering the same insured, a company may seek reimbursement from the other insurer for amounts paid in settlement of judgment. For example, should an "excess" insurer defend and successfully settle a claim against an insured, most states would allow full recovery of the settlement from the primary insurance company, as long as the settlement was within the limits of liability of the primary insurer. However, there is also a question as to defense costs and whether they can be recovered from the primary insurer. This comment is directed at a resolution of that issue.

APPLICATION OF "OTHER INSURANCE" CLAUSES AND THEIR EFFECT

The typical situation in which the Other Insurance Clause comes into effect is that where the named insured borrows another car which he does not own, or drives a car insured by his employer. Thus, in addition to the insurance on the automobile, the insured will also have his own policy covering his personal automobile. Insofar as insurance on the borrowed or employer's car is concerned, the applicable provision of the Other Insurance Clause is the pro rata one:

> If the insured has other insurance against a loss covered by part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss. . . .[3]

---

[1] For an annotated copy of the 1967 Standard Family Automobile Liability Policy, *see* N. RISJORD AND J. AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES, STANDARD PROVISIONS AND APPENDIX 258 (Supp. 1967) [hereinafter cited as N. RISJORD AND J. AUSTIN].

[2] Liberty Nat'l Ins. Co. v. Eberhart, 398 P.2d 997, 1000 (Alaska, 1965).

[3] N. RISJORD AND J. AUSTIN, *supra* note 1, at 62.

The applicable section of the Other Insurance Clause which would pertain to the insured's own personal policy is the excess provision which provides that:

> [T]he insurance with respect to a temporary substitute or non-owned automobile shall be excess insurance over any other valid and collectible insurance.[4]

Pro Rata v. Excess—The Various Solutions

At least one court has given effect to both the pro rata and excess clause by holding the pro rata insurer liable for its pro rata share and the excess insurer liable for the excess over that amount, up to the limits of its policy.[5] Another minority position is the "Lamb-Weston Doctrine," so named after the case of *Lamb-Weston, Inc. v. Oregon Automobile Insurance Company*.[6] The plaintiff in this case had double insurance coverage with Other Insurance Clauses identical to those quoted above. The trial court held that the pro rata insurer was primarily liable and, consequently, liable for the full amount of the loss, since the total loss fell within the policy limits. However, on appeal, the Oregon Supreme Court reversed. After reviewing the theories applied to the problem, the court concluded:

> It is our view that any attempt to give effect to the "other insurance" provision of one policy while rejecting it in another is like pursuing a will o' the wisp. . . .
>
> . . . .
>
> In our opinion, whether one policy uses one clause or another, when any come in conflict with the "other insurance" clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.[7]

In later cases, Oregon has consistently followed the *Lamb-Weston* decision, and in *Fireman's Insurance Company v. St. Paul Fire & Marine Insurance Company*,[8] the Oregon Supreme Court offered further justification:

> This court believes it is good public policy not to put an injured plaintiff, or a defendant who is fortunate enough to have duplicate coverage, in a position where there is any possibility one insurer can say, "After you, my dear Alphonse!" while the other says, "Oh no, after you, my dear Gaston!" They must walk arm in arm through the door of responsibility.[9]

---

[4] *Id.*

[5] American Sur. Co. v. Canal Ins. Co., 157 F. Supp. 386 (W.D. S.C. 1957).

[6] 219 Ore. 110, 341 P.2d 110 (1959).

[7] *Id.* at 122, 124, 341 P.2d at 115, 119.

[8] 243 Ore. 10, 411 P.2d 271 (1966).

[9] *Id.* at 15, 411 P.2d at 274. For other cases which have also approved apportionment between pro rata and excess clause insurance policies, see Annot., 76 A.L.R. 2d 512 (1961). For further arguments in favor of the Oregon position, see Comment, 47 ORE. L. REV. 430 (1968).

The Majority View

The majority of courts attempt to give effect to the intent and meaning of Other Insurance Clauses. Under this approach, when one policy contains a pro rata clause and the other an excess clause, full effect will be given to the excess clause, leaving the insurer whose policy contains the pro rata clause primarily liable. Thus, the insurer with the pro rata clause must bear the whole loss, up to the imits of its policy, and then the excess insurer is liable for any balance, up to the limits of its policy. Effect is given to the meaning of the policies by holding that the pro rata insurance is "other insurance" within the meaning of that term in the excess clause—thus giving the excess insurance clause full force and effect. However, the policy containing the excess insurance is not considered "other insurance" within the meaning of that term as used in the pro rata clause, and therefore the pro rata clause is not operative.

> [T]he liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be noted that under this rule, the courts give no application to the other insurance clause in the primary policy, which provides that if the additional insured has other valid and collectible insurance, he shall not be covered by the primary policy. That is because the insurance under the excess coverage policy is not regarded as other collectible insurance, as it is not available to the insured until the primary policy has been exhausted. Or, to put it another way, a non-ownership clause, with an excess coverage provision, does not constitute other valid and collectible insurance within the meaning of a primary policy with an omnibus clause.[10]

Wisconsin

There are two Wisconsin cases which deal specifically with concurrent coverage between a pro rata and excess clause. In *Lubow v. Morrissey*,[11] the defendant struck the plaintiff, a pedestrian, while driving a car loaned him by a garage while a car furnished by his employer was being repaired. The garage's policy contained the following proration clause:

> "If the insured has other insurance . . . the company shall not be liable under this policy for a greater proration of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of all valid and collectible insurance against such loss."[12]

---

[10] 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4914 (1962). *See also* Comment, 65 COL. L. REV. 319 (1965), condensed at 1965 PERS. INJ. COMM. ANN. 207; Note, 38 MINN. L. REV. 838 (1954); Barksdale, *Conflicting Decisions on Primary and Excess Coverage Under Automobile Liability Policies*, 1965 INS. COUN. J. 158; Annot., 76 A.L.R. 2d 502 (1961).

[11] 13 Wis. 2d 114, 108 N.W.2d 156 (1961).

[12] *Id.* at 121, 108 N.W.2d at 161.

The policy provided by the defendant's employer covered the defendant in this situation, stating that coverage as to a temporary substitute automobile " 'shall be excess insurance over any other valid and collectible insurance.' "[13]

On appeal, the court acknowledged *Reetz v. Werch*,[14] a case dealing with two excess insurance clauses, neither of which was given effect, with liability thus prorated between the two excess insurers. However, the conflict between a pro rata clause and an excess clause was "not so completely frontal as it was between the excess clauses considered in *Reetz v. Werch*."[15] Thus, the court adopted the majority approach and attempted to give meaning to the excess clause.

> In the Liberty Mutual [excess insurer] policy before us, the excess clause does not apply to the coverage for which the policy was primarily written, and does apply only to certain types of coverage of automobiles not owned by the named insured. In such situations it is to be anticipated that there will be coverage under another policy issued primarily to provide such coverage. Apparently insurers frequently, if not ordinarily, intend to bear a greater responsibility where the coverage may be termed primary than that which they bear under other types of coverage, and the courts have considered that such usage itself provides a rational basis for giving an excess clause controlling effect in a conflict such as is presented here.[19]

Lubow v. Morrissey was reaffirmed in *Groth v. Farmers Mutual Automobile Insurance Company*,[17] where the pro rata clause was identical to the one quoted above. The court in *Groth* stated:

> [W]here there is a conflict between the proration clause of one policy and the excess-coverage clause of another policy, the conflict is resolved by holding that the proration clause must be applied as if the insurance provided by the policy, whose excess-coverage clause is applicable, were not available to the insured.[18]

The primary insurer in *Groth* also had an excess coverage clause which the court found had no application, "[B]ecause this excess coverage provision is expressly confined to temporary substitute automobiles or automobiles other than the insured vehicle."[19]

Conclusion

In Wisconsin, the primary insurer is liable for the total amount of any recovery that does not exceed the policy limits. However, it does not automatically follow that an excess insurer can also recover the costs

[13] *Id.* at 120, 108 N.W.2d at 160.
[14] 8 Wis. 2d 388, 98 N.W.2d 924 (1959).
[15] 13 Wis. 2d at 123, 108 N.W.2d at 161.
[16] *Id.* at 123-24, 108 N.W.2d at 162. The court also cited with approval 2 APPLEMAN, INSURANCE LAW AND PRACTICE § 4914 (1962).
[17] 21 Wis. 2d 655, 124 N.W.2d 606 (1963).
[18] *Id.* at 660, 124 N.W.2d at 608.
[19] *Id.* at 659, 124 N.W.2d at 608

expended in defending the insured covered by both policies. Courts are not unanimous in allowing an excess insurer recovery for defense costs. Those that have allowed recovery do so on the basis of subrogation. Other courts hold that an insurer's duty to defend is personal as between the insured and the insurer, and deny an excess insurer the right of recovery for defense costs. Using this general dichotomy (subrogation versus the personal nature of the duty to defend), cases dealing with the recovery of defense costs between primary and excess insurers will be analyzed in an attempt to establish what should be the rights of two such co-insurers.

SUBROGATION OF DEFENSE COSTS

Theory of Subrogation

The equitable doctrine of subrogation is a means of making the wrongdoer pay for his misconduct and reduce substantially the costs of insurance to the insurer and the insured.

> As a working definition in automobile insurance cases, subrogation may be said to be that right acquired by one party, upon the involuntary payment of the sum of money for which he is only secondarily liable, to pursue a third person. This right is coupled with a right to abrogate the original contract if the payee releases the wrongdoer prior to payment, and an affirmative right to recoup from the payee if he releases the wrongdoer subsequent to a payment under the policy.[20]

In *D'Angelo v. Cornell Paperboard Products Company*,[21] the Wisconsin court stated:

> Subrogation may properly be applied when a person other than a mere volunteer pays a debt or demand which in equity and good conscience should be satisfied by another. The doctrine rests upon the theory of unjust enrichment.[22]

Subrogation is of two kinds, legal and conventional. Legal subrogation is effected by operation of law and arises out of a relationship. It is the substitution of one person for another, with reference to a claim or right. Being equitable in nature, it depends neither on contract nor on privity of parties.[23]

Convention subrogation is contractual and the rights of the insurer depend upon the terms of the contract and the rights of the insured. Conventional subrogation may be effective where legal subrogation

[20] Billings, *The Significance of Subrogation in Automobile Insurance Practice*, 1948 INS. L. J. 707 (Sept.).

[21] 19 Wis. 2d 390, 120 N.W.2d 70 (1963).

[22] *Id.* at 399-400, 120 N.W.2d at 75. "Subrogation is closely akin to, if not part of, the equitable principle of 'restitution' and 'unjust' enrichment. The object of subrogation is . . . to promote and accomplish justice [and to prevent injustice, and] is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity and good conscience, should pay it." 83. C.J.S. *Subrogation* § 2 (1953).

[23] Stroh v. O'Hearn, 176 Mich. 164, 142 N.W. 865 (1913); Kennedy-Ingalls Corp. v. Meissner, 5 Wis. 2d 100, 92 N.W.2d 247 (1958).

would fail because its requirements were not fulfilled. The standard subrogation clause in the automobile liability policy is an example of conventional subrogation:

> In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the *insured* shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The *insured* shall do nothing after loss to prejudice those rights.[24]

It can be argued that conventional subrogation is available to the excess insurer seeking reimbursement from the primary insurer for costs expended in defense of the common insured. However, in allowing the excess insurer recovery for defense costs, most decisions have been based on legal or equitable subrogation.[25]

Allowance of Subrogation for Defense Costs

One of the earliest cases to allow an excess insurer recovery against a primary insurer for defense costs was *Aetna Casualty & Surety Company v. Buckeye Union Casualty Company*,[26] a case in which the insured drove a loaned automobile insured by Buckeye. The insured had his own automobile liability policy with Aetna, but since the insured was driving a temporary substitute car at the time of the accident. Aetna was the excess insurer. Buckeye refused to defend, and Aetna settled within the limits of coverage provided by the primary insurance; Aetna then brought an action to recover amounts paid, including the costs of defense. The trial court ruled that Aetna had acted as a "mere volunteer" and could not recover. On appeal, the Ohio Supreme Court reversed, and held that Aetna was not a volunteer in settling, but was secondarily liable.

> It is well settled that one secondarily liable, who is forced to pay because of the refusal, or failure after demand, of the one primarily liable to discharge the obligation, has the right of indemnity from the one primarily liable.[27]

---

[24] N. RISJORD AND J. AUSTIN, *supra* note 1, at 263.

[25] The reciprocal rights and duties of co-insurers to one another do not depend upon contract but upon the principles of equitable subrogation. Utica Mut. Ins. Co. v. Monarch Ins. Co. of Ohio, 250 Cal. App. 2d 538, 58 Cal. Rptr. 639 (1967). *See also* New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London, 34 Ill. App. 2d 69, 173 N.E.2d 543 (1961); Maryland Cas. Co. v. Marquette Cas. Co., 143 So. 2d 249 (La. App. 1962); National Farmers Union Property & Cas. Co. v. Farmers Ins. Group, 14 Utah 89, 377 P.2d 786 (1962); Western Pac. Ins. Co. v. Farmers Ins. Exch., 69 Wash. 2d 11, 416 P.2d 468 (1966). However, *see* Zurich Ins. Co. v. New Amsterdam Cas. Co., 117 Ga. App. 426, 160 S.E.2d 603 (1968) and Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co., in which the claim of the excess insurer for defense costs was allowed under the subrogation clause of the policy. *See generally* 7A APPLEMAN, INSURANCE LAW AND PRACTICE, § 4691 (1962) and American Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 280 F.2d 453 (5th Cir. 1960).

[26] 157 Ohio St. 385, 105 N.E.2d 568 (1952).

[27] *Id.* at 392, 105 N.E.2d at 571-72.

Thus, Aetna had an equitable right to recover defense costs from Buckeye. In a later case, another Ohio court allowed the excess insurer recovery of *all* costs of defense incurred in settling the claim, even though the limits of liability of the primary insured were $5,000 and the claim was settled for $20,000.[28]

The case most often cited in which subrogation for defense costs was allowed is *Continental Casualty Company v. Zurich Insurance Company.*[29] In this case, three insurance companies, Zurich, Continental, and General, insured the same party. Zurich was held to be the primary insurer, but it had refused to defend. The trial court ordered that all three companies share the cost of defense on a pro rata basis in the same ratio that they shared in paying the injured party. Zurich claimed that the duty to defend was personal to the insurers and that this duty could not be divided. Zurich cited *Financial Indemnity Company v. Colonial Insurance Company*[30] as authority, in which the court had said:

> [T]he agreement to defend is not only completely independent of and severable from the indemnity provisions of the policy, but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services.[31]

However, this argument was negated and, on that point, *Financial Indemnity* was overruled.

> In this connection we note that any services contemplated by the agreement to defend are not personal in the sense that the services of any specifically named individual would be personal. Rather, such services necessarily contemplate the employment by the company of competent licensed attorneys and other personnel who, from a practical standpoint, must be viewed as rendering services to the company and for its benefit of other obligated insurers, as well as for the benefit of the insured.[32]

The court then went on to affirm the trial court and to apply the doctrine of equitable subrogation that requires any obligated carrier, which refuses to defend, to share in the costs of the insured's defense.

> A contrary result would simply provide a premium or offer a possible windfall for the insurer who refuses to defend, and thus, by leaving the insured to his own resources, enjoys a chance that the costs of defense will be provided by some other insurer at no expense to the company which declines to carry out its contractual commitments.[33]

---

[28] Fidelity & Cas. Co. of N.Y. v. Secured Cas. Co., 87 Ohio L. Abst. 459, 180 N.E.2d 297 (Ct. of C.P., Summit Co. 1961).
[29] 17 Cal. Rptr. 12, 366 P.2d 455 (Sup. Ct. 1961).
[30] 132 Cal. App. 2d 207, 281 P.2d 883 (1955).
[31] *Id.* at 211, 281 P.2d at 885.
[32] 17 Cal. Rptr. at 18, 366 P.2d at 461.
[33] *Id.* at 18, 366 P.2d at 461. *See also* Government Employees Ins. Co. v. St. Paul Fire & Marine Ins. Co., 243 Cal. App. 2d 186, 52 Cal. Rptr. 317 (1966); Pacific

Louisiana allows equitable subrogation of defense costs in favor of the excess insurer.[34] However, in *Allstate Insurance Company v. Atlantic Mutual Insurance Company,*[35] the excess insurer recovered only those amounts spent in defense *before* the primary insurer took over the defense. In this case, the excess insurer had spent $784.68 in providing a defense for the insured before the primary insurer was willing to defend. After the primary insurer assumed the defense, the excess insurer was a mere volunteer and could not recover an additional $2,319.85 spent in defending the case.

> In the absence of some action on the part of the defendant equivalent to abandonment of its defense or a notice from defendant plaintiff to obtain its own counsel, all of which is absent in this case, the action of plaintiff was voluntary on its part.[36]

It should also be noted that the primary insurer settled within the limits of its coverage, and the excess insurer was not held liable for any portion of the settlement.

Subrogation and Defense Costs: An Inconsistent Application

Basic to establishing the rights of subrogation is a finding that the party making payment is secondarily liable. There is no question that an excess insurer becomes secondarily liable for any judgment or settlement which the insured must pay. This is the language of the Other Insurance Clause in automobile policies and, as already indicated,[37] most courts have given that clause full effect. However, the Other Insurance Clause does not include defense costs so as to render the excess insurer secondarily liable for such expenses, in addition to costs of damages. The standard Other Insurance provision reads as follows:

> If the insured has other insurance against a *loss* covered by Part I of this policy, the company shall not be liable under this policy for a greater proportion of *such loss* than the applicable limit *of liability stated in the declarations* bears to the total applicable limit of liability of all valid and collectible insurance against such loss.[38]

The "loss" referred to in this clause is limited by the declarations in the policy. However, defense costs are not so limited, and are payable "in addition to the applicable limits of liability"[39] under the supplementary

Indem. Co. v. Universal Underwriters Ins. Co., 43 Cal. Rptr. 26 (Dist. Ct. App. 1965). "Where there has been more than one insurer of the same risk, several courts have held that that costs of defense may be divided among them. And this would seem to be the better view. If two insurers have agreed to assume the defense of the same action, one should not be allowed to escape that duty and place the entire burden on the other, by virtue of a breach of its obligation." 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4691 (1962).

[34] Maryland Cas. Co. v. Marquette Cas. Co., 143 So. 2d 249 (La. App. 1962).

[35] 187 So. 2d 774 (La. App. 1966).

[36] *Id.* at 776.

[37] *Supra,* note 10.

[38] N. RISJORD AND J. AUSTIN, *supra* note 1 (emphasis added).

[39] *Id.*

payment provisions. Therefore, an excess insurer cannot become secondarily liable for defense costs on the basis of the Other Insurance Clause in the policy. It is true that subrogation, "being equitable in nature[,] . . . depends neither on contract nor privity of parties."[40] Thus, subrogation can apply irrespective of the policy language. However, in examining the Other Insurance Clause, we are merely seeking to establish the relationship between the insured and the excess insurer and whether such a relationship maintains a "primary" status. Since the Other Insurance Clause does not include defense costs, the relationship between the insured and excess insurer remains primary. If an excess insurer remains primarily liable for defense costs and cannot obtain the standing of secondary liability, it would seem that an excess insurer cannot invoke the doctrine of equitable subrogation—an equitable remedy based on secondary liability.[41]

Assuming, arguendo, that the status of secondary liability as to defense costs can be achieved, courts have been inconsistent in applying the theory. The Other Insurance Clause renders an excess carrier liable *only when the policy limits of the primary insurer are exceeded.* At that time, an excess insurer must assume liability and is responsible for any amount of loss up to the applicable limits of liability. It follows that once the limits of the primary insurer are exceeded, the excess insurer is no longer secondarily liable—and thus would also be liable for defense costs. For example, in a case where a $20,000 judgment is returned against a common insured, and the limits of liability of both the excess and primary carrier are $10,000, the defense costs should be prorated according to the limits of liability—in this case each carrier paying one-half.[42] However, some courts have allowed an excess insurer to recover *all* costs of defense, even though the primary limits of liability were exceeded.[43] This inconsistent application of subrogation is illustrated in *Fidelity & Casualty Company of New York v. Secured Casualty Com-*

[40] Kennedy-Ingalls Corp. v. Meissner, 5 Wis. 2d 100, 92 N.W.2d 247 (1958).

[41] "The Other Insurance conditions refer only to loss. There is no policy authority for prorating claim expenses in accordance with policy provisions or otherwise. The result seems equitable but it is not authorized by policy provisions." N. RISJORD AND J. AUSTIN, *supra* note 1, comment to Case No. 157, Bituminous Cas. Corp. v. Travelers Ins. Co., 122 F. Supp. 197 (D.C. Minn. 1954).

It is apparent that any holding that defense costs are included in the Other Insurance Clause is, at best, questionable. Because of this doubt or ambiguity, the policy should be construed against the insurer. Kopp v. Home Mutual Ins. Co., 6 Wis. 2d 53, 94 N.W.2d 224 (1959). Thus, an excess insurer should not be able to take advantage of an ambiguous section of the policy to obtain secondary liability status, a posture which will enable him to escape liability.

[42] *See* Continental Cas. Co. v. Zurich Ins. Co., 17 Cal. Rptr. 12, 366 P.2d 455 (Sup. Ct. 1961).

[43] American Sur. Co. of N.Y. v. Canal Ins. Co., 285 F.2d 934 (4th Cir. 1958); Fireman's Fund Indem. Co. v. Freeport Ins. Co., 30 Ill. 2d 69, 173 N.E.2d 543 (1961; Fidelity & Cas. Co. of N.Y. v. Secured Cas. Co., 87 Ohio L. Abst. 459, 180 N.E.2d 297 (Ct. of C.P., Summit Co. 1961).

pany,[44] where the primary insurer refused to defend and the excess insurer settled the claim for $20,000. The applicable limit of liability of the primary insurer was $5,000, and $200,000 was the coverage of the excess insurer. In the action by the excess insurer against the primary insurer, the court allowed a recovery of $7,575.67: the limits of the primary insurer's liability, plus $2,575.67 for court costs and costs of defense. The court, by allowing the excess insurer recovery for *all* defense costs, reached a result which is clearly inconsistent with the underlying theory of subrogation that requires secondary liability. Assuming that subrogation applies to defense costs between two insurance companies, the costs in *Fidelity* should have been prorated on the basis of policy limits once the excess insurer became primarily liable under the Other Insurance Clause.

The Duty to Defend—A Personal Contract

In addition to the conceptual problems surrounding subrogation of defense costs, courts denying an excess insurer the right of subrogation against a primary insurer have done so on the grounds that the duty to defend is personal and nothing more than the insurer's expense of doing business.

> More important, the duty to defend is personal to the relationship of this insurer and this assured. Whatever may be the right ultimately to saddle off a part of the cost of defense actually undertaken once payment has been made and a right comparable to subrogation is being asserted, it is contrary to the very nature of the contract that the insurer can scout around in hopes that it can find someone whose defense the assured is compelled to accept.[45]

A recent Minnesota case which fully discusses the rights of excess and primary insurance companies as to the costs of defense is *Iowa Mutual Insurance Company v. Universal Underwriters Insurance Company*.[46] The only issue in that case was the right of an excess insurer to recover from a primary insurer the costs and expenses incurred prior to the primary insurer's assumption of responsibility and settlement of the case.[47] The trial court allowed the excess insurer, Iowa Mutual, to re-

[44] 87 Ohio L. Abst. 459, 180 N.E.2d 297 (Ct. of C.P., Summit Co. 1961).

[45] American Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 280 F.2d 453 (5th Cir. 1960). *See also* Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710 (3d Cir. 1938); United States Fidelity & Guar. Co. v. Tri-State Ins. Co., 285 F.2d 579 (10th Cir. 1960); Maryland Cas. Co. v. American Family Ins. Group, 199 Kan. 373, 429 P.2d 931 (1967); Iowa Mut. Ins. Co. v. Universal Underwriters Ins. Co., 276 Minn., 362, 150 N.W.2d 233 (1967); Westchester Fire Ins. Co. v. Rhoades, 405 S.W.2d 812 (Tex. 1966).

[46] 276 Minn. 362, 150 N.W.2d 233 (1967).

[47] The primary insurer had claimed that it did not provide coverage to the common insured, and the Minnesota Supreme Court, in Lowry v. Kneeland, 263 Minn. 537, 117 N.W.2d 207 (1962), held that Universal Underwriters did provide common coverage. After this decision, the excess insurer, Iowa

cover defense costs and expenses totaling $3,703.83. On appeal, the Minnesota Supreme Court reversed, holding that the excess insurer could not recover the costs of defense. The court ruled out any application of contribution between the two companies, since there was no joint or common undertaking. Both the excess and primary insurers were obligated to defend under separate contracts.[48]

As to subrogation, the equities between the two insurance companies were equal, and each of them had a separate and distinct obligation to defend:

> "Since he incurred no expenses or damages in this respect, and since the obligation for attorney's fees and expenses which plaintiff incurred was required under its own policy, it would follow that plaintiff acquired no rights against defendant under the subrogation clause referred to."[49]

The court then recited the supplementary payments provision of the Standard Family Automobile Policy and held that the expenses, which the excess insurer was seeking to recover, were what any automobile liability insurer expects to incur.

> Iowa Mutual [the excess insurer] received premiums from Kneeland to assume the risk of insuring these expenses. Moreover, the expenses incurred in the third-party action were primarily expended to protect its own interests. These charges are not in the nature of a payment of a debt for which another was primarily liable. They are Iowa Mutual's expense of doing business.[50]

Thus, the Other Insurance Clause was virtually ignored and the excess insurer continued to be primarily liable for defense costs.

Wisconsin

To date, the Wisconsin Supreme Court has not had the question of defense costs between excess and primary insurers properly before it. In *Lubow v. Morrissey*,[51] the issue was raised prematurely and no definitive statements were made by the court;[52] the court also refused

Mutual, brought an action to recover the defense costs spent prior to the primary insurer's assumption of control of the case.

[48] The right to contribution is an independent right founded upon principles quite different from those upon which the right of subrogation is based. The obligation to respond in contribution arises only after one of several parties, equally liable for the same debt, pays more than his pro rata share of the common debt. The cause of action does not exist until such a payment is made. But where the doctrine of subrogation applies, the subrogee becomes the owner of the very rights of the obligee; their rights are not similar or analogous, but identical. Niagara Fire Ins. Co. v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Brown Root Inc. v. United States, 92 F. Supp. 257 (D.C. Tex. 1950).

[49] 276 Minn. 369, 150 N.W.2d 237, quoting American Sur. Co. v. State Farm Mut. Auto. Ins. Co., 274 Minn., 81, 85, 142 N.W.2d 304, 306 (1966).

[50] *Id.* at 370, 150 N.W.2d at 238.

[51] 13 Wis. 2d 114, 108 N.W.2d 156 (1961).

[52] "All three insurers had, and continue to have an obligation to provide Morrissey with defense. It seems premature to make any adjustment among them of the expense of doing so in advance of final judgment." *Id.* at 125, 108 N.W.2d at 163.

to grant the excess insurer, Liberty Mutual, a motion for summary judgment dismissal. Liberty Mutual argued that since the amount demanded in the complaint of the plaintiff was $30,000 and the amount of coverage provided by the primary insurer was $200,000, the motion for dismissal should be granted. The court agreed that Liberty Mutual should not be retained as a proper defendant on the unlikely possibility of the plaintiff's being able to collect from Liberty Mutual. Nonetheless, Liberty Mutual's motion for dismissal was denied. It was pointed out that the statute in question, Wisconsin Statute section 260.11 (1967), establishes an insurer as a proper party defendant when that insurer "[B]y its policy agrees to prosecute or defend said action, or agrees to engage counsel or prosecute or defend said action, or agrees to pay the costs of litigation." On the basis of its agreement to defend and pay "all expenses" under the supplementary payments provision, Liberty Mutual was held to be a proper defendant.

In retaining the excess insurer as a proper party defendant, the court in *Lubow* had to make a distinction between the duty to defend and an insurer's liability to pay sums which the insured became obligated to pay as damages arising out of the use of his car. The duty to defend was not remote or on the same level as the liability to pay a judgment. Thus, in the application of Wisconsin Statute section 260.11 (1967), the Other Insurance Clause did not diminish in any way the excess insurer's duty to defend. From this it would appear that an excess insurer cannot become secondarily liable for defense costs. However, it remains to be seen whether the Wisconsin court will apply the same reasoning to a case involving defense costs between primary and excess insurers, and deny the right of subrogation to the excess insurer.

CONCLUSION

The remedy of subrogation is highly favored in the law and is an equitable principle which courts are inclined to extend and give a liberal application.[53] Nonetheless, the application of subrogation to defense costs between insurance companies is a questionable policy. The basis of subrogation, secondary liability, is a difficult standing to achieve when the Other Insurance Clause in the policy does not apply to defense costs. In addition, the insured has not suffered any real damage as long as the excess insurer does in fact defend the common insured. Thus, the insured in such a situation does *not* have any basis on which to sue the primary insurer for a failure to pay the costs and expenses of a defense.

Finally, in almost all cases of dispute between a primary and excess insurer over the costs of defense, the named insured has borrowed a car belonging to another, or is driving a car insured by his employer.

[53] 83 C.J.S. *Subrogation* § 14 (1953).

Thus the primary insurer (the insurer of the car) is an omnibus insurer, and the insured is a party with whom the primary insurer has had little or no contact. On the other hand, the excess insurer is usually the personal insurance company of the common insured with whom the insured has had negotiations, prior experience, and personal contact. In this situation, it is not surprising that the insured looks first to his own personal company (the excess insurer) for legal help and reimbursement—and this is expected by the excess insurer. Given this situation, it is doubtful if the issue of defense costs between primary and excess insurance companies justifies use of the equitable doctrine of subrogation.

ARNOLD P. ANDERSON